No. 82029-5

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

vs.

RICHARD HENRY MUTCH, Petitioner.

BRIEF OF RESPONDENT

DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By HILARY A. THOMAS
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #22007

Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784

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A. ISSUES PRESENTED

1. Whether the State provided sufficient notice of its intent to seek an exceptional sentence under and substantially complied with RCW 9.94A.537(2) where the defendant was originally sentenced as a persistent offender and his exceptional sentence was based on an aggravating factor related to criminal history which existed at the time he was originally sentenced.

2. Whether, if the State was unable to seek an exceptional sentence under RCW 9.94A.537(2), the court's imposition of an exceptional sentence should be upheld where it indicated it would have imposed the exceptional sentence independent of the State's request, and where the trial court has no duty to provide any notice to a defendant of its intent to impose an exceptional sentence.

3. Whether the trial court had the authority to impose an exceptional sentence on its own accord, independent of the State's request, where the trial court had such authority prior to the 2005 and 2007 amendments to the exceptional sentencing provisions and where those amendments did not eliminate nor significantly alter the trial court's authority to impose an exceptional sentence based on a defendant's criminal history.

B. FACTS

On September 28th, 1994, Petitioner Mutch was found guilty of five counts of Rape in the Second Degree and one count of Kidnapping in the Second Degree. At sentencing the court found Mutch to be a persistent offender and sentenced Mutch to life without the possibility of release. Mutch appealed his conviction and sentence. His conviction and sentence were upheld in the partially published decision

of State v. Mutch, 87 Wn. App. 433, 942 P.2d 1018 (1997), *rev. den.*, 134 Wn.2d 1016 (1998).[1]

After having filed numerous collateral attacks against his conviction and sentence, Mutch filed a personal restraint petition with the Supreme Court under Sup. Ct. No. 80958-5. In its response to this petition the State conceded that Mutch was entitled to be resentenced pursuant to In re Lavery, 154 Wn.2d 249, 111 P.3d 857 (2005). On April 30, 2008 the Supreme Court issued an order granting the personal restraint petition and remanding for resentencing.

On June 17, 2008, the State filed a Notice of Intent to Seek an Exceptional Sentence indicating that it was seeking an exceptional sentence under RCW 9.94A.535(2)(c), high offender score resulting in current offenses going unpunished. CP 104. On June 25th Mutch filed a Motion to Allow Mutch to Act as Co-Counsel and a Motion to Recuse the Honorable Judge Mura, the judge who had heard the trial. CP 101-03; 1RP 13.[2] At the hearing, Judge Mura granted Mutch's

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[1] COA No. 35810-3-I.
[2] 1RP refers to the verbatim report of proceedings for June 27, 2008; 2RP for the proceedings on July 28 and 31, 2008.

motion to represent himself with stand-by counsel and recused himself.[3] CP 100; 1RP 14-16.

After hearings on July 28th and 31st, the Honorable Judge Uhrig resentenced Mutch to an exceptional sentence of 400 months based on Mutch's high offender score resulting in some of his current offenses going unpunished. CP 10, 13, 22-25. In addition to finding that the notice the State gave was sufficient, the trial court reached its own determination, independent of the State's request for an exceptional sentence, that Mutch should receive an exceptional sentence. CP 24. The court indicated it was relying on its inherent authority in imposing the exceptional sentence. 2RP 44. Mutch, pro se, filed a notice of appeal directly with the Supreme Court.[4] 2RP 44.

C. ARGUMENT

After Mutch's persistent offender sentence was reversed, the State sought an exceptional sentence on the basis of his high offender score resulting in current offenses going unpunished, an aggravating factor that may be imposed by a judge without any findings by a jury. The State provided Mutch with formal notice of its intent to seek an

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[3] The judge recused himself because Mutch had sent him threatening letters from prison resulting in the judge feeling that he would be prejudiced against Mutch.
[4] His trial counsel also filed a notice of appeal that was filed with the Court of Appeals, under COA No. 62123-8-I.

exceptional sentence as soon as the matter was remanded back to the trial court. After hearing argument and taking the matter into consideration, the trial court imposed an exceptional sentence as requested by the State, but also indicated that it would have imposed the same sentence of its own accord. In doing so, the court indicated it was relying upon its inherent authority to do so.

The State's substantial compliance with the 2007 amendment to the exceptional sentencing provisions of the Sentencing Reform Act ("SRA"), RCW 9.94A.537(2), provided Mutch with sufficient notice of its intent to seek an exceptional sentence. The State originally sought the longest sentence it possibly could based on Mutch's criminal history, life without the possibility of release. Mutch received a sentence above the standard range based on his criminal history in 1994 and his criminal history was the basis for the State's request for an exceptional sentence at resentencing. Therefore, the trial court did not err in finding that the State's notice was sufficient for the State to seek an exceptional sentence under the 2007 amendment.

Alternatively, Mutch's sentence should be upheld based on the trial court's independent exercise of its authority to impose an exceptional sentence. As acknowledged by Mutch, the trial court is under no statutory duty to provide notice of its intent to impose an

exceptional sentence prior to trial.[5] The trial court here explicitly found that it would have imposed an exceptional sentence of its own accord, under its inherent authority. The 2005 and 2007 amendments to the exceptional sentencing provisions did not eliminate, nor significantly alter, the trial court's existing authority under the SRA to impose an exceptional sentence based on a defendant's criminal history. The 2005 legislation provided procedures for empanelling juries to find aggravating factors. The court's authority for imposing an exceptional sentence of its own accord based on criminal history was not diminished.

1. The State's substantial compliance with the 2007 amendment provided sufficient notice in order for the State to seek an exceptional sentence under RCW 9.94A.537.

Mutch asserts that the State could not seek an exceptional sentence because it failed to provide proper notice under the federal constitution as well as the applicable statutes.[6] There is no constitutional requirement for individual notification because the

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[5] See Appellant's Brief at 19.

[6] The issue of what notice, constitutional or statutory, is required under RCW 9.94A.537 in order to empanel a jury was presented in the case of State v. Powell, which is pending decision: "Whether, under the 2007 amendments to RCW 9.94A.537, a trial court on remand following reversal of an exceptional sentence may impanel a jury to determine aggravating factors if the State did not give notice before trial that it intended to seek an exceptional sentence." No. 80496-6, *State v. Powell.*

statutes provide notice. The statutory requirement for notice, under RCW 9.94A.537(1), only applies when the State is seeking an exceptional sentence for cases that are pending trial or plea. For exceptional sentences imposed on remand at a resentencing, under RCW 9.94A.537(2), there is no specific notice requirement as the statute contemplates the defendant is already on notice because s/he received an exceptional sentence previously and thereby is aware that an exceptional sentence on the same aggravating facts could be imposed on remand. The State substantially complied with the provisions of RCW 9.94A.537(2), providing Mutch with sufficient notice of the possibility of an exceptional sentence on remand.

a. constitutional notice

Mutch contends that the State was constitutionally required, under the Sixth Amendment, to provide notice of its intent to seek an exceptional sentence based on the Ninth Circuit case of Gautt v. Lewis, 489 F.3d 993 (9th Cir. 2007). Generally, under the Sixth Amendment, the accused shall be informed of "the nature and cause of the accusation." U.S. Constitution Sixth Amendment. This requires that all the essential elements of a crime appear in the charging document. State v. McCarty, 140 Wn.2d 420, 425, 429, 998 P.2d 296 (2000).

In Gautt, the issue before the court was whether the defendant's due process rights under the Sixth Amendment were violated when he was charged with a sentencing enhancement under one statute, which provided for a 10 year enhancement, but then received a sentence enhancement under an entirely different section of the statute, which provided for a twenty-five year-to-life enhancement. Gautt, 489 F.3d at 997-98. The court decided that the language in the information was insufficient to put the defendant on notice that he was facing a twenty-five-to life sentencing enhancement. Id. at 1008. In doing so, the Court relied on Cole v. Arkansas[7] for the proposition that "to satisfy the Sixth Amendment, 'an information [must] state the elements of an offense charged with sufficient clarity to apprise a defendant of what he must be prepared to defend against.'" Id. at 1003.

Gautt is a sentencing enhancement case, not an aggravating factor case, and nothing in Gautt would require Sixth Amendment notice under the specific facts of this case. *See*, State v. Gunther, 45 Wn.App. 755, 758, 727 P.2d 258 (1986) (notice required regarding sentencing aggravating factors is not the same as that required for invocation of mandatory sentencing provisions of firearm statutes).

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[7] Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948).

Mutch's reliance on Gautt is an attempt to elevate sentencing aggravating factors to elements of a crime. Aggravating factors do not create new aggravated offenses. S*ee*, State v. Murawski, 142 Wn. App. 278, 285, 173 P.3d 994 (2007), *rev. denied*, 164 Wn.2d 1005 (2008) (argument that sentencing aggravating factors should be treated as an offense is unsupported); *see also*, State v. Berrier, 143 Wn. App. 547, 553-556, 178 P.3d 1064 (2008) (no federal or state constitutional requirement to plead aggravating factors in the information). Under the structure of the SRA, defendants have always been on notice of the possibility of an exceptional sentence. State v. Pillatos, 159 Wn.2d 459, 470, 150 P.3d 1130 (2007).[8]

> The reason that a notice requirement was not included is that an exceptional sentence is a possibility in every sentencing under the Sentencing Reform Act. To require that each defendant be given notice of that ever-existent potentiality would be redundant. . . . The possibility of an exceptional sentence always exists, and notice of that fact is inherent in the statutory provisions which create the possibility.

State v. Gunther, 45 Wn. App. 755, 758, 727 P.2d 258 (1986), *rev. denied*, 108 Wn.2d 1013 (1987) (*quoting* D. Boener, Sentencing in

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[8] "All of these defendants had warnings of the risk of an exceptional sentence. At the time all of these defendants committed the crimes set forth above, Washington had a seemingly valid exceptional sentencing system which gave fair notice of the risk of receiving such a sentence." Pillatos, 159 Wn.2d at 470.

Washington § 9.19 (1985)). There is no requirement under the Sixth Amendment for individualized notice of the possibility for an exceptional sentence.

b. statutory notice

Mutch asserts that the State was required to provide notice prior to trial, not just prior to sentencing, under subsection (1) of RCW 9.94A.537. However, the State was proceeding under the 2007 amendment to RCW 9.94A.537, subsection (2), in its request for imposition of an exceptional sentence. Subsection (2) provides:

> In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

RCW 9.94A.537(2) (2008); Laws of 2007 Chapter 205 §2. There is nothing in this language that requires the State to provide any specific notice at or prior to resentencing. Under the provision the defendant is already on notice as to the possibility of, and the basis for, an exceptional sentence because one has already been imposed. The State substantially complied with the provisions of the 2007 amendment and therefore was entitled to seek an exceptional sentence under that amendment.

In September of 1994 pre-trial the State filed a notice of intent to seek a persistent offender sentence due to Mutch's criminal history. Supp CP __, Sub Nom. 57. Mutch was sentenced as a persistent offender in December 1994, which sentence was subsequently overturned leading to the resentencing that occurred here. His judgment and sentence at the time reflected an offender score of 19. Given an offender score over 9, he certainly would have been on notice that an exceptional sentence based on his criminal history was a good possibility if not probability, but for the State's intent to seek a persistent offender sentence. *See*, RCW 9.94A.535(2)(g) (1994); State v. Stephens, 116 Wn.2d 238, 803 P.2d 319 (1991), *overruled in part by* State v. Hughes, 154 Wn.2d 118, 140 P.3d 192 (2005) (offender score of 19 warranted imposition of exceptional sentence if standard sentence would result in no additional punishment for some of the current offenses).

Upon remand from the Supreme Court and prior to resentencing, the State filed a notice of intent to seek exceptional sentence based on the aggravating factor under RCW 9.94A.535(2) (c), high offender score resulting in some current offenses going

unpunished.[9] At resentencing the State argued that a persistent offender sentence, while not technically an "exceptional sentence" under RCW 9.94A.535 and .537, is at least the equivalent to an exceptional sentence since it carries a greater penalty than an exceptional sentence, life without the possibility of release. RCW 9.94A.570; CP 69; 2RP 13. The court found that the notice the State gave was sufficient, through imposition of the persistent offender sentence in 1994. CP 24.

The State notified Mutch in 1994 that it would seek the longest sentence possible, via the persistent offender provisions, due to his criminal history. Prior to resentencing the State provided notice of the specific aggravating factor it was relying upon, one based on his criminal history as well, and one which was a basis for imposition of an exceptional sentence when Mutch was originally sentenced.

The State substantially complied with the provisions of RCW 9.94A.537(2) which give Mutch notice of the possibility of an exceptional sentence upon remand based on his criminal history. A sentence above the standard range was imposed in Mutch's case in

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[9] Orally, the court noted that the State had informed Mutch that it would seek an exceptional sentence prior to the Supreme Court vacating his sentence and remanding for resentencing. 2RP 43-44.

1994.[10] At resentencing, the court relied upon the same facts as it did at the original sentencing, Mutch's criminal history, as a basis for imposing an exceptional sentence. RCW 9.94A.537(2) permits the court to impanel a jury at a resentencing in order to find aggravating facts if an exceptional sentence was imposed previously. Here, no jury was necessary to find aggravating facts. As noted in Pillatos, "... if the changes to the statute do not alter the consequences of the crime then there is likely no relevant lack of notice." Pillatos, 159 Wn.2d at 470. The State substantially complied with the requirements under RCW 9.94A.537(2) thereby providing Mutch with sufficient notice of its intent to seek an exceptional sentence.

Even if the State has failed to meet the requirements under RCW 9.94A.537(2), the trial court here indicated it was imposing an exceptional sentence independent of any request by the State. CP 24 (CL 6). Mutch concedes that RCW 9.94A.535 permits a trial court to impose an exceptional sentence based on a defendant's criminal history without providing notice. See Appellant's brief at 19. Therefore, the

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[10] Under the SRA "standard sentence range" is defined as "the sentencing court's discretionary range in imposing a nonappealable sentence." RCW 9.94A.030(44). Under RCW 9.94A.585, those sentences that may not be appealed are those that fall within the standard ranges set forth in RCW 9.94A.510 and .517. RCW 9.94A.585(1).

State's inability to comply with any required statutory notice provisions does not preclude the exceptional sentence being upheld on the basis of the trial court's independent decision to impose the exceptional sentence.

2. The Legislature never eliminated the trial court's authority to impose an exceptional sentence based on a defendant's criminal history, therefore the trial court had the authority to impose an exceptional sentence on remand.

Mutch asserts that the trial court did not have any statutory authority, under either the 2005 or 2007 amendments to the exceptional sentencing provisions, to impose an exceptional sentence on remand. The amendments to the exceptional sentence provisions in 2005 and 2007 largely addressed and were designed to address the requirements of Blakely[11] regarding jury findings. They did not significantly alter the trial court's existing statutory authority to impose an exceptional sentence where jury findings were *not* required to impose an exceptional sentence. As the amendments did not remove the trial court's authority to impose an exceptional sentence based on a defendant's criminal history, the trial court had the statutory authority to impose the exceptional sentence here.

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[11] Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d (2004).

The construction of a statute is a question of law that is reviewed de novo. State v. Alvarado, 164 Wn.2d 556, 561, 192 P.3d 345 (2008). The primary objective in interpreting a statute is to give effect to the intent of the legislature. Id. at 561-62. In ascertaining and giving effect to the intent of the Legislature, the spirit and intent of the law should prevail over the letter of the law. In re Detention of A.S., 138 Wn.2d 898, 911, 982 P.2d 1156 (1999). "In discerning the plain meaning of a provision, [the court] consider[s] the entire statute in which the provision is found, as well as related statutes or other provisions in the same act that disclose legislative intent." Alvarado, 164 Wn. 2d at 562. "In interpreting statutory terms, a court should 'take into consideration the meaning naturally attaching to them from the context, and [ ] adopt the sense of the words which best harmonizes with the context.'" State v. Roggenkamp, 153 Wn.2d 614, 623, 106 P.3d 196 (2005). The legislature's statement of intent can be crucial to interpretation of a statute. Spokane County Health Dist. v. Brockett, 120 Wn.2d 140, 151, 839 P.2d 324 (1992).

Prior to the Blakely decision in June 2004, the SRA provided the trial court with the authority to impose an exceptional sentence if the court found substantial and compelling reasons to support an

exceptional sentence. State v. Armstrong, 106 Wn.2d 547, 549, 723 P.2d 1111 (1989).

> The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. ...
> ...
> The following are illustrative factors which the court may consider in the exercise of its discretion to impose an exceptional sentence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences. ...

RCW 9.94A.535 (1994). The list of aggravating circumstances set forth in the statute was illustrative rather than exclusive. Armstrong, 106 Wn.2d at 550. Under caselaw as of 1994, the court could impose an exceptional sentence if the defendant's criminal history was such that he would receive "free crimes," *i.e.*, some current offenses would go unpunished under a standard range sentence. *See*, State v. Stephens, *supra*; State v. Smith, 123 Wn.2d 51, 864 P.2d 1371 (1993).[12]

After the United States Supreme Court issued its opinion in Blakely the legislature amended the exceptional sentence procedures in order to bring Washington law into compliance with that decision.

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[12] While Smith was overruled by Hughes because the aggravating factor relied upon, RCW 9.94A.535(2)(i) required a factual finding of "clearly too lenient," if the aggravating factor had only required a free crime finding, it would not have violated Blakely. Alvarado, 164 Wn.2d at 567-68.

Laws of 2005, Ch. 68 §1.[13] "The legislature intends that aggravating facts, other than the fact of a prior conviction, will be placed before a jury." Id. The legislature also indicated: "While the legislature intends to bring the sentencing reform act into compliance as previously indicated, the legislature recognizes the need to restore the judicial discretion that has been limited as a result of the Blakely decision." Id.

In amending RCW 9.94A.535 the legislature added language that facts, other than the fact of a prior conviction, should be determined in accord with section 4 of the legislation (RCW 9.94A.537). See App. A. Laws of 2005 Chapter 68. The amendment also provided that the list of factors was no longer illustrative, but was now exclusive, and set forth which ones were to be determined by the court and which to be determined by the jury. Id. In doing so, the legislature narrowed the trial court's authority to impose exceptional sentences on its own to four aggravating circumstances, but did not change the trial court's procedure for doing so. One of the aggravating circumstances to be determined by the court is that the defendant's high offender score resulted in some of the current offenses going

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[13] "The legislature intends to conform the sentencing reform act, chapter 9.94A RCW, to comply with the ruling in *Blakely v. Washington*..." Laws of 2005 Chapter 68 §1.

unpunished. Id. This Court has determined that this aggravating circumstance does not require jury findings and the trial court has the authority to impose an exceptional sentence based on this factor alone. Alvarado, 164 Wn.2d at 567-68.

In State v. Pillatos the Supreme Court held that the 2005 amendment applied to all sentencing hearings since it was signed into law on April 15, 2005. Pillatos, 159 Wn.2d at 465. It further held that the new procedures to permit juries to find facts in support of exceptional sentences did not apply in those cases where a defendant had already pleaded or been found guilty. Id. at 465, 468. In determining that the Laws of 2005 Chapter 68 applied only to pending criminal matters where trials had not begun or pleas had not yet been accepted, the court relied upon the following language within RCW 9.94A.537:

> *At any time prior to trial or entry of the guilty plea* if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state the aggravating circumstances upon which the requested sentence will be based.

Id. at 470 (emphasis added). This language permitted the State to give notice of its intent to seek an exceptional sentence but required that it do so prior to trial or entry of a guilty plea.

Pillatos decided the applicability of the 2005 legislation within the context of the State's request for empanelment of juries to decide aggravating facts. All of the cases before the court were ones in which the State was seeking to impose an exceptional sentence. It was not confronted with and did not address the factual scenario where a trial court imposed an exceptional sentence based on an aggravating factor that did not require jury findings. The legislation provided that at any time prior to trial or plea, *the state may give notice of its intent to seek an exceptional sentence.* (Emphasis added.) The 2005 amendment did not change the procedure used when the court imposes an exceptional sentence of its own accord based on criminal history.

In response to the Pillatos decision, the Legislature passed another amendment to the exceptional sentence provisions in 2007, quoted previously herein at p. 9. Laws of 2007 Chapter 205 §2; App. B. In passing this amendment, the Legislature explicitly set forth its reason for the amendment:

> In State v. Pillatos, 150 P.3d 1130 (2007), the Washington supreme court held that the changes made to the sentencing reform act concerning exceptional sentences in chapter 68 Laws of 2005 do not apply to cases where the trials had already begun or guilty pleas had already been entered prior to the effective date of the act on April 15, 2005. *The legislature intends that the superior courts shall have the authority to impanel juries to find aggravating circumstances in all cases that come before the courts for*

trial or sentencing, regardless of the date of the original trial or sentencing.

Laws of 2007 Chapter 205 §1. This legislation only amended the provisions of RCW 9.94A.537 and did not affect the provisions of RCW 9.94.535.[14] The legislation was aimed at ensuring that the trial court had the necessary authority to empanel juries in order to impose exceptional sentences based on aggravating factors that would need to be found by a jury.

The 2007 amendment specifically provides the authority for a superior court to impanel a jury to consider aggravating facts, under RCW 9.94A.535(3),[15] on a remand where an exceptional sentence was imposed originally. It did not alter or amend the superior court's existing authority to impose an exceptional sentence based on an aggravating factor that did not require jury findings. Rather, the legislature specifically explained that it intended for the superior court to have the authority necessary to impose an exceptional sentence regardless of the date of the original trial or sentencing.

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[14] RCW 9.94A.535 was amended in 2007, but only to add an aggravating factor, theft of certain metal property, to the aggravating circumstances listed under RCW 9.94A.535(3).

[15] RCW 9.94A.535(3) lists those aggravating circumstances that must be found by a jury.

The law in effect at the time of Mutch's sentencing provided for an exceptional sentence based upon "free crimes." The law in effect now provides for a judge to impose an exceptional sentence based on "current offenses going unpunished." In passing the 2005 and 2007 amendments to RCW 9.94A.535 and .537, the legislature never removed the trial court's authority to impose an exceptional sentence based on the defendant's criminal history. The inquiry as to whether there are substantial and compelling reasons to impose an exceptional sentence is a legal conclusion that *still* is to be made by the trial court post-Blakely. State v. Hughes, 154 Wn.2d 118, 140, 110 P.3d 192 (2005), *abrogated in part by* Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) (emphasis added).

The authority for the court's imposition of an exceptional sentence, independent of the State's request, existed prior to the 2005 and 2007 amendments, and survived those amendments. The express purpose of the 2005 amendment was to bring the exceptional sentencing provisions into compliance with the dictates of Blakely. Blakely concerns are not implicated with the aggravating factor under RCW 9.94A.535(2)(c). Pre- and post-Blakely the trial court has had the authority to impose an exceptional sentence based on prior conviction facts. Pre- and post- the 2005 amendment to RCW

9.94A.535, the trial court has had the authority to impose exceptional sentences based on prior conviction facts.

There is nothing in the 2005 or 2007 amendments that removed the trial court's ability to impose, as opposed to the State's ability to seek, an exceptional sentence based on prior conviction facts. The trial court here, after taking a couple days to consider the matter, emphasized that it was imposing an exceptional sentence of its own accord as well. 2RP 33-34, 47-48. The trial court had the authority to impose an exceptional sentence of its own accord under RCW 9.94A.535(2)(c).

3. The trial court's miscalculation of the offender score requires remand for resentencing.

Mutch argues that his offender score was calculated incorrectly. The State has previously conceded that the offender score found and relied upon by the judge was wrong.[16] The State concedes that the federal bank robbery conviction should not have been included in the offender score and that the two prior California robberies should have counted as one. The State does not, however, concede that the prior California robberies should not have been counted as violent felonies.

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[16] *See* State's Answer to Statement of Grounds for Direct Review; State's Motion for Remand; State's Motion to Permit Formal Entry of Orders Pursuant to RAP 7.2(e).

Mutch asserts that the matter should be remanded for imposition of the standard range. The State agrees that the matter would need to be remanded because the exceptional sentence was based on the offender score.[17] *See,* State v. Jennings, 106 Wn. App. 532, 543, 24 P.3d 430, *rev. denied*, 144 wn.2d 1020 (2001) (exceptional sentence may be upheld despite incorrectly calculated offender score if the record clearly demonstrates the trial court would have imposed the same sentence); State v. Jackson, 150 Wn.2d 251, 276, 76 P.3d 217 (2003) (court need not remand for sentencing when it invalidates one or more of the reasons supporting an exceptional sentence as long as it is clear from the record that the court would have imposed the same sentence on the basis of the remaining valid reasons). As argued herein, however, the trial court would not be restricted to the standard range, but would have the authority to impose an exceptional sentence.

Mutch asserts that his prior California robberies should not be counted as "violent offenses," arguing that the classification of an offense is a fact that must be submitted to a jury under Blakely. Mutch never asserted this below. Mutch acknowledges that under current law

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[17] The State initially moved this Court for remand to address the incorrect offender score. The State has pending a motion to permit formal entry of a new judgment and sentence imposed on Nov. 13, 2008 at resentencing, which the State pursued when the motion for remand was deferred.

the "violent offense" fact relates to a prior conviction, which under Apprendi does not require a jury finding.[18] Mutch asserts that the legal underpinning of this exception *should* no longer be good law. However, it still is. State v. Smith, 150 Wn.2d 135, 143, 75 P.3d 934 (2003).

Mutch also asserts that the classification of the offense is not a fact of prior conviction. However, this Court has held that *facts* related to prior convictions do not require jury findings. *See*, State v. Thiefault, 160 Wn.2d 409, 418-19, 158 P.3d 580 (2007) (no right to have jury determine comparability of foreign convictions); State v. Jones, 159 Wn.2d 231, 234, 149 P.3d 636 (2006), *cert. denied*, 127 S.Ct. 2066 (2007) (no right to have jury make finding that defendants were on community placement at the time they committed their crimes). Mutch's prior California robberies were properly classified as violent offenses and counted as such.

D. CONCLUSION

For the reasons set forth above, the State respectfully requests that this Court hold that the trial court had the authority to impose the exceptional sentence in this case. If this Court grants the State's

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[18] Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

motion to permit formal entry of the judgment and sentence entered on November 13th, the matter would not need to be remanded.

Respectfully submitted this 19th day of December, 2008.

HILARY A. THOMAS, WSBA #22007
Appellate Deputy Prosecutor
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached, to Petitioner's counsel, NANCY COLLINS, addressed as follows:

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101

Sydney A. Koss 12/19/2008
Legal Assistant **Date**

APPENDIX A

Approved by the Governor April 15, 2005.
Filed in Office of Secretary of State April 15, 2005.

CHAPTER 68

[Senate Bill 5477]
SENTENCING REFORM ACT

AN ACT Relating to sentencing outside the standard sentence range; amending RCW 9.94A.530 and 9.94A.535; adding a new section to chapter 9.94A RCW; creating new sections; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. **Sec. 1.** The legislature intends to conform the sentencing reform act, chapter 9.94A RCW, to comply with the ruling in *Blakely v. Washington,* 542 U.S. ... (2004). In that case, the United States supreme court held that a criminal defendant has a Sixth Amendment right to have a jury determine beyond a reasonable doubt any aggravating fact, other than the fact of a prior conviction, that is used to impose greater punishment than the standard range or standard conditions. The legislature intends that aggravating facts, other than the fact of a prior conviction, will be placed before the jury. The legislature intends that the sentencing court will then decide whether or not the aggravating fact is a substantial and compelling reason to impose greater punishment. The legislature intends to create a new criminal procedure for imposing greater punishment than the standard range or conditions and to codify existing common law aggravating factors, without expanding or restricting existing statutory or common law aggravating circumstances. The legislature does not intend the codification of common law aggravating factors to expand or restrict currently available statutory or common law aggravating circumstances. The legislature does not intend to alter how mitigating facts are to be determined under the sentencing reform act, and thus intends that mitigating facts will be found by the sentencing court by a preponderance of the evidence.

While the legislature intends to bring the sentencing reform act into compliance as previously indicated, the legislature recognizes the need to restore the judicial discretion that has been limited as a result of the *Blakely* decision.

Sec. 2. RCW 9.94A.530 and 2002 c 290 s 18 are each amended to read as follows:

(1) The intersection of the column defined by the offender score and the row defined by the offense seriousness score determines the standard sentence range (see RCW 9.94A.510, (Table 1) and RCW 9.94A.517, (Table 3)). The additional time for deadly weapon findings or for ((~~those offenses enumerated~~)) other adjustments as specified in RCW 9.94A.533((~~(4) that were committed in a state correctional facility or county jail~~)) shall be added to the entire standard sentence range. The court may impose any sentence within the range that it deems appropriate. All standard sentence ranges are expressed in terms of total confinement.

(2) In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to section 4 of this act. Acknowledgement includes not objecting to information stated in the presentence reports. Where

the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in section 4 of this act.

(3) In determining any sentence above the standard sentence range, the court shall follow the procedures set forth in section 4 of this act. Facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the standard sentence range except upon stipulation or when specifically provided for in RCW 9.94A.535(2) (d), (e), (g), and (h).

Sec. 3. RCW 9.94A.535 and 2003 c 267 s 4 are each amended to read as follows:

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of section 4 of this act.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence ((~~unless it is imposed on an offender sentenced under RCW 9.94A.712. An exceptional sentence imposed on an offender sentenced under RCW 9.94A.712 shall be to a minimum term set by the court and a maximum term equal to the statutory maximum sentence for the offense of conviction under chapter 9A.20 RCW~~)).

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

((~~The following are illustrative factors which the court may consider in the exercise of its discretion to impose an exceptional sentence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.~~))

(1) Mitigating Circumstances - Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(2) Aggravating Circumstances - Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances - Considered By A Jury - Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in section 4 of this act.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance ((~~due to extreme youth, advanced age, disability, or ill health~~)).

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) ((~~The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.~~

~~(j) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.~~

~~(k)~~)) The offense resulted in the pregnancy of a child victim of rape.

((~~(l)~~)) (j) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

(((~~(m)~~))) (k) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or commercial production.

(((~~(n)~~))) (l) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

(m) The offense involved a high degree of sophistication or planning.

(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.

(p) The offense involved an invasion of the victim's privacy.

(q) The defendant demonstrated or displayed an egregious lack of remorse.

(r) The offense involved a destructive and foreseeable impact on persons other than the victim.

(s) The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.

(t) The defendant committed the current offense shortly after being released from incarceration.

(u) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.

(v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

(w) The defendant committed the offense against a victim who was acting as a good samaritan.

(x) The defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.

(y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).

NEW SECTION. **Sec. 4.** A new section is added to chapter 9.94A RCW to read as follows:

(1) At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

(2) The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

(3) Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3) (a) through (y), shall be presented to the jury during the trial of the alleged crime, unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a

separate proceeding if the evidence supporting the aggravating fact is not part of the res geste of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

(4) If the court conducts a separate proceeding to determine the existence of aggravating circumstances, the proceeding shall immediately follow the trial on the underlying conviction, if possible. If any person who served on the jury is unable to continue, the court shall substitute an alternate juror.

(5) If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.

NEW SECTION. **Sec. 5.** (1) The sentencing guidelines commission shall review the sentencing reform act as it relates to the sentencing grid, all provisions providing for exceptional sentences both above and below the standard sentencing ranges, and judicial discretion in sentencing. As part of its review, the commission shall:

(a) Study the relevant provisions of the sentencing reform act, including the provisions in this act;

(b) Consider how to restore the judicial discretion which has been limited as a result of the *Blakely* decision;

(c) Consider the use of advisory sentencing guidelines for all or any group of crimes;

(d) Draft proposed legislation that seeks to address the limitations placed on judicial discretion in sentencing as a result of the *Blakely* decision; and

(e) Determine the fiscal impact of any proposed legislation.

(2) The commission shall submit its findings and proposed legislation to the legislature no later than December 1, 2005.

NEW SECTION. **Sec. 6.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. **Sec. 7.** This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately.

Passed by the Senate April 14, 2005.

Passed by the House April 12, 2005.

Approved by the Governor April 15, 2005.

Filed in Office of Secretary of State April 15, 2005.

APPENDIX B

CHAPTER 205

[Engrossed House Bill 2070]

EXCEPTIONAL SENTENCES

AN ACT Relating to exceptional sentences; amending RCW 9.94A.537; creating a new section; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. **Sec. 1.** In *State v. Pillatos,* 150 P.3d 1130 (2007), the Washington supreme court held that the changes made to the sentencing reform act concerning exceptional sentences in chapter 68, Laws of 2005 do not apply to cases where the trials had already begun or guilty pleas had already been entered prior to the effective date of the act on April 15, 2005. The legislature intends that the superior courts shall have the authority to impanel juries to find aggravating circumstances in all cases that come before the courts for trial or sentencing, regardless of the date of the original trial or sentencing.

Sec. 2. RCW 9.94A.537 and 2005 c 68 s 4 are each amended to read as follows:

(1) At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

(2) In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

(3) The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

(((~~(3)~~))) (4) Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3) (a) through (y) shall be presented to the jury during the trial of the alleged crime, unless the jury has been impaneled solely for resentencing, or unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the res geste of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

(((~~(4)~~))) (5) If the superior court conducts a separate proceeding to determine the existence of aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t), the proceeding shall immediately follow the trial on the underlying conviction, if possible. If any person who served on the jury is unable to continue, the court shall substitute an alternate juror.

(((~~(5)~~))) (6) If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.

NEW SECTION. **Sec. 3.** This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately.

Passed by the House April 18, 2007.
Passed by the Senate April 17, 2007.
Approved by the Governor April 27, 2007.
Filed in Office of Secretary of State April 30, 2007.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

vs.

RICHARD HENRY MUTCH,

Defendant.

No. 94-1-00117-8
(Supreme Court No. 82029-5)

RESPONDENT'S SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS

TO THE CLERK OF THE COURT:

Please prepare and transmit to the Court of Appeals, Division One, the following clerk's papers:

Sub No.	Document	Date Filed
57	Notice of Intent to Seek Penalties Under Initiative 593, Persistent Offenders Act	09/07/1994

DATED this 19th day of December, 2008.

HILARY A. THOMAS, WSBA #22007
Appellate Deputy Prosecutor
Counsel for Respondent

Whatcom County Prosecuting Attorney
311 Grand Avenue Suite 201
Bellingham, WA 98225
Tel: (360) 676-6784
Fax: (360) 738-2532

CERTIFICATE

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or caused to be delivered, a true and correct copy of the document to which this Certificate is attached to the Court of Appeals and appellant's counsel, Nancy Collins, addressed as follows:

Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101

Sydney R. Koss
LEGAL ASSISTANT

12/19/2008
DATE

Whatcom County Prosecuting Attorney
311 Grand Avenue Suite 201
Bellingham, WA 98225
Tel: (360) 676-6784
Fax: (360) 738-2532